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No.

In the
Supreme Court of the United States

LOUIS LOWERY, WILL LIVINGSTON, MICHELLE BROOKS, and LATOSHA LINDSAY,

Petitioners,

v.

JESS BURGESS and MARILYN THOMPKINS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, public officials sued for damages under 42 U.S.C. § 1983 enjoy qualified immunity if their alleged conduct does not violate "clearly established" federal law. The questions presented are:

1. Where neither the Supreme Court nor the governing circuit has addressed the legality of an official's conduct, can the law be deemed "clearly established" based solely upon decisions from non-controlling jurisdictions?

2. If courts may consider decisions from non-controlling jurisdictions, can the law be deemed "clearly established" where courts outside the governing circuit are in conflict as to the legality of the conduct in question?

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PETITION FOR A WRIT OF CERTIORARI

Louis Lowery, Will Livingston, Michelle Brooks, and Latosha Lindsay petition this Court for a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 201 F.3d 942 and is reproduced in the appendix to this petition at App. 1-11. The decision of the district court is not reported and is reproduced in the appendix at App. 12-33.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. The court of appeals denied the petitioners' timely petition for rehearing with suggestion for rehearing *en banc* on February 24, 2000. Appendix, *infra*, at App. 34. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondents' claims, against which the petitioners asserted the defense of qualified immunity, are based upon 42 U.S.C. § 1983 and the Fourth Amendment.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The petitioners are correctional officials employed by the Illinois Department of Corrections at the Pontiac Correctional Center in Pontiac, Illinois. App. 12-13. The respondents, Jess Burgess and Marilyn Thompkins, have family members incarcerated on Pontiac's death row. App. 12, 15. Between September 1995 and April 1997, the petitioners strip-searched the respondents a number of times as a condition of allowing them to visit their incarcerated relatives. App. 15-18. The respondents signed consent forms permitting the searches but alleged that the petitioners did not have reasonable suspicion to believe that the respondents were engaged in wrongdoing. App. 16, 19.

The respondents sued for damages and injunctive relief under 42 U.S.C. § 1983, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). The suit alleged that the searches in question violated the respondents' rights under the Fourth Amendment to the federal Constitution. App. 12-13. The petitioners moved for summary judgment, arguing that they were entitled to qualified immunity because the law was not clearly established on whether consent-based strip searches of prison visitors must be predicated on reasonable suspicion. App. 2, 13. The district court denied the summary judgment motion, and the petitioners appealed. App. 2.

The Seventh Circuit held that the Fourth Amendment requires prison officials to have reasonable suspicion before subjecting visitors to strip searches and that the law on this point was clearly established at the time of the searches at issue. App. 10-11. In so ruling, the

court acknowledged that neither the Supreme Court nor any Seventh Circuit panel had previously addressed the issue of strip searches in the prison visitation context. App. 3. The court nevertheless rejected the view that the law can be deemed "clearly established" only by decisions of the Supreme Court or the governing circuit. App. 3-4. The test for qualified immunity, according to the Seventh Circuit, is whether reasonable public officials, considering "all relevant sources of guidance to the law," including "constitutional tradition," could have thought it "reasonably possible" that the Supreme Court or the governing circuit would have held that their conduct was constitutional. App. 6-7.

In this case, the Seventh Circuit explained, the law was "clearly established" because the First, Fifth, Sixth, and Eighth Circuits had all held that the Fourth Amendment requires prison officials to have reasonable suspicion before subjecting visitors to strip searches. App. 5, 10-11. The court acknowledged that two decisions from the Supreme Court of Hawaii, decided in 1978 and 1980, had upheld against Fourth Amendment challenges strip searches of prison visitors that were not predicated on reasonable suspicion. App. 5-6. But while the Seventh Circuit found state court cases relevant to the "clearly established law" analysis, it determined that a split in authority does not give officials an "automatic safe harbor" from damages liability. App. 6. The court concluded that the Hawaii decisions did not cast sufficient doubt on the state of the law governing prison strip searches, apparently because those decisions pre-dated the decisions from the four federal circuits. App. 6, 10-11.

Having found that the respondents alleged a violation of their clearly established Fourth Amendment rights, the court of appeals affirmed the denial of the petitioners' qualified immunity defense and remanded the case for further proceedings in the district court. App. 10-11.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve conflicting rulings by the circuit courts of appeals over the meaning of "clearly established law" as that term is used in qualified immunity jurisprudence. In this case, the Seventh Circuit found the law to be clearly established, and thus rejected the petitioners' qualified immunity defense, even though (1) no Supreme Court or Seventh Circuit precedent had addressed the validity of the petitioners' alleged conduct; and (2) the courts that had addressed the conduct were split as to its validity. The Seventh Circuit's practice of considering non-controlling authorities in the "clearly established law" analysis conflicts with the Fifth and Eleventh Circuits' better practice of considering only controlling authority. In addition, the Seventh Circuit's view that the law can be clearly established notwithstanding a split in authorities is in tension with this Court's decisions and the policies underlying the qualified immunity doctrine. Because of the importance of qualified immunity to officials at all levels of government, this Court should resolve these uncertainties in the present case.

I. This Court Should Clarify The Relevant Decisional Law To Be Considered In Determining Whether The Law Is Clearly Established For Qualified Immunity Purposes.

The qualified immunity doctrine serves a vital role in civil rights litigation by protecting public officials from exposure to money damages when their discretionary conduct does not violate "clearly established" federal law. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[1] By restricting damages liability to instances where officials had "fair warning" that their conduct was unlawful, qualified immunity strikes a balance between the goals of constitutional tort law (i.e., compensation and deterrence) and the concern that damages actions may inhibit government officials in the legitimate discharge of their duties. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997); *Anderson*, 483 U.S. at 638.

Because qualified immunity looks to the state of the law at the time of the official's conduct, many of the questions surrounding the doctrine turn on the meaning of "clearly established law." The Court has given content to this important notion in a number of cases. *Anderson v. Creighton*, for example, explains that, for the law to be clearly established, it must be developed at an appropriate level of specificity: "The contours of the right must be

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[1] The qualified immunity defense is available to state and local officials in actions brought under 42 U.S.C. § 1983 and to federal officials in suits brought under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See Wilson*, 526 U.S. at 609.

sufficiently clear that a reasonable person would understand that what he is doing violates that right." 483 U.S. at 640; *see also Wilson*, 526 U.S. at 614-15. In *Lanier*, 520 U.S. at 268-69, the Court rejected the view that only its own decisions could clearly establish the law. And in *Elder v. Holloway*, 510 U.S. 510, 515-16 (1994), the Court instructed circuit courts to consider "all relevant authority," not just cases cited in the district court, in determining whether the law is clearly established.

Although these cases have done much to clarify the meaning of "clearly established law," one difficult and recurring aspect of the problem remains unanswered: Where no Supreme Court or controlling circuit decisions have addressed the validity of an official's conduct, may the law be deemed clearly established by reference to decisions from non-controlling jurisdictions? *See Harlow*, 457 U.S. at 818 n.32.[2] This case gives the Court a chance to address this question and, in doing so, to resolve a conflict among the circuits.[3]

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[2] In *Wilson*, 526 U.S. at 617, this Court determined that public officials had not violated clearly established law where (1) no controlling authority had addressed the issue and (2) there was no "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." Because the officials were entitled to immunity under any conception of the "clearly established law" standard, the *Wilson* Court did not authoritatively decide whether decisions from non-controlling jurisdictions should be taken into account.

[3] The petitioners did not argue in the courts below that "clearly established law" may be determined only by reference to decisions from controlling jurisdictions. The court of appeals, however, understood the petitioners to have done so. *See Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000) (Appendix, *infra*, at

(continued...)

A. The Courts Of Appeals Disagree Over Whether Non-Controlling Caselaw Can Be Used To Show That The Law Is Clearly Established.

Lacking guidance from this Court, the courts of appeals are thoroughly divided over the appropriate universe of decisional law to consider in determining whether the law is clearly established. In the Fifth and Eleventh Circuits, only controlling precedents can clearly establish the law. *See Gunaca v. Texas*, 65 F.3d 467, 475 (5th Cir. 1995); *Brady v. Fort Bend County*, 58 F.3d 173, 175 & n.11 (5th Cir. 1995); *Wilson v. Strong*, 156 F.3d 1131, 1135 (11th Cir. 1998). The Seventh, Eighth, and Ninth Circuits, on the other hand, will consider "all relevant sources of guidance to the law," including decisions from state and federal courts outside their own circuit. *Burgess v. Lowery*, 201 F.3d 942, 945-46 (7th Cir. 2000) (Appendix, *infra*, at App. 6-7); *see also Buckley v. Rogerson*, 133 F.3d 1125, 1129 (8th Cir. 1998); *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996).

Most circuits have developed standards between these extremes. The Fourth and Sixth Circuits, for example, will "ordinarily" confine their inquiry to controlling caselaw. *See Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir.

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[3] (...continued)
App. 3). The court of appeals then decided that cases from outside the controlling jurisdictions may be considered in the qualified immunity analysis. 201 F.3d at 944-45 (App. 4). This Court will consider an issue of law not raised in the court of appeals if that court in fact addressed the issue. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). Therefore, the question is properly raised here.

1998) (*en banc*), *aff'd*, 526 U.S. 603 (1999); *Cope v. Heltsley*, 128 F.3d 452, 459 n.4 (6th Cir. 1997). The Tenth Circuit will consider cases from other circuits, but it is unclear whether it will consider state court cases. *See Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1257 n.9 (10th Cir. 1998). The Third Circuit appears to follow the Tenth Circuit's approach, *see Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996), although it recently suggested that the question was an open one, *see Johnson v. Horn*, 150 F.3d 276, 286 & n.6 (3d Cir. 1998). The Second Circuit is internally divided, *compare Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997) (decisions from other circuits may be considered), *with Russell v. Selsky*, 35 F.3d 55, 57-60 (2d Cir. 1994) (only Supreme Court and Second Circuit cases should be considered), while the First Circuit considers a variety of factors in determining whether non-controlling authority should be taken into account, *see El Dia, Inc. v. Rossello*, 165 F.3d 106, 110 n.3 (1st Cir. 1999). Finally, the District of Columbia Circuit has left the question open. *See Hobson v. Wilson*, 737 F.2d 1, 25-26 (D.C. Cir. 1984); *Zweibon v. Mitchell*, 720 F.2d 162, 168-69 (D.C. Cir. 1983).

As the foregoing survey shows, the circuits are in complete disarray on this critical issue. The natural result of this confusion is that officials in certain jurisdictions have a better chance of succeeding on a qualified immunity defense than officials elsewhere. Without question, a decision to restrict or expand the relevant universe of decisional law in the qualified immunity analysis will generally be outcome-determinative. *See, e.g., Amaechi v. West*, 87 F. Supp. 2d 556, 562 n.9 (E.D. Va. 2000) ("Predictably, an official will ordinarily retain a qualified im-

munity defense if the right is recognized in some other circuit, but not in the Fourth Circuit."); *cf.* Christopher L. McIlwain, *The Qualified Immunity Defense in the Eleventh Circuit and Its Application to Excessive Force Claims*, 49 Ala. L. Rev. 941, 960 (1998) ("[m]ost Eleventh Circuit qualified immunity cases turn on whether the precedent cited by the plaintiff possesses the attributes necessary to clearly establish the law"). The instant case is a prime example: had the suit arisen in the Eleventh Circuit, the court would have granted qualified immunity, because there is no controlling authority in that circuit on the legality of prison strip searches. The case arose in the Seventh Circuit, however, so the petitioners were denied qualified immunity, precisely because the Seventh Circuit considered non-binding authority in its "clearly established law" analysis.

Application of the qualified immunity doctrine will remain uneven until this Court authoritatively decides what decisional law is relevant to the "clearly established law" analysis. *See* Paul M. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1301 (3d ed. 1988) ("In the absence of a generally accepted and clear-cut theory of the role of precedent in adjudication—an especially complex problem in a federal system—how stable would you expect application of the 'clearly established law' standard to be?"). Because of the acute need for a nationally binding decision to guide the lower courts, this Court should grant *certiorari*.

B. The Seventh Circuit's Practice Of Considering Non-Controlling Authority Places An Undue Burden On Public Officials By Charging Them With Knowledge Of An Expansive Legal Universe.

The Seventh Circuit's practice of denying qualified immunity based upon extra-circuit caselaw cannot be squared with the reasons for which the qualified immunity doctrine exists. Its error in adopting this practice is an additional reason for this Court to grant review.

Qualified immunity is designed to limit money damage awards to cases in which the defendant official had reasonable notice that his conduct was unlawful. *See Davis v. Scherer*, 468 U.S. 183, 195 (1984). In the Seventh Circuit's view, notice of this sort can be supplied not only by the decisions of the Supreme Court, thirteen federal appeals courts, and the highest courts of all fifty states, but also by the "constitutional tradition that generates those decisions." Appendix, *infra*, at App. 7. Realistically, however, public officials cannot be expected to monitor the legal developments that emerge from such a vast body of caselaw, much less to acquire insights from "constitutional tradition." *Cf. Davis*, 468 U.S. at 196 & n.13 (rejecting view that officials should be charged with knowledge of administrative regulations and state statutes "on pain of money damages," given that officials are often subject to a "plethora" of ambiguous and conflicting rules).

When the relevant legal universe is virtually limitless, as it is under the Seventh Circuit's approach to the "clearly established law" question, the risk that an official will fail to unearth a relevant decision from a remote

court is dramatically increased. As a result, officials can seldom be sure that a particular *course of* conduct will be shielded from liability. For public officials who are often required to make quick decisions in uncertain areas, this is not the type of "reasonable notice" envisioned by this Court's qualified immunity cases.

The Fifth and Eleventh Circuits' practice of considering only controlling precedents better comports with the idea of reasonable notice implicit in the qualified immunity doctrine. Officials in those circuits must conform their actions to constitutional standards as articulated by the courts that actually govern their conduct. But they are not required to embark on an "Odyssean quest" to determine whether the law is clearly established. *Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998) (*en banc*), *vacated*, 526 U.S. 1142 (1999). Instead, when no binding authority exists, officials in the Fifth and Eleventh Circuits can make hard decisions without fear of being saddled with personal money judgments.[4] This approach places reasonable limits on the universe of decisional law that public officials can be expected to know, but also holds them responsible for acting in conformity with federal law. This Court should review this case and adopt the Fifth and Eleventh Circuits' salutary practice.

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[4] Of course, if an official's conduct is blatantly illegal, the law will be deemed clearly established notwithstanding a lack of controlling cases on point. *See Lanier*, 520 U.S. at 271.

II. The Seventh Circuit's View That The Law Can Be Clearly Established Notwithstanding A Split In Authority Is Inconsistent With This Court's Precedents And The Policies Underlying Qualified Immunity.

This case raises a second question regarding the "clearly established law" analysis, one that arises only if the Seventh Circuit was correct to consider non-controlling caselaw: Can the law be clearly established where the relevant authorities are divided as to the legality of the conduct in question? The Seventh Circuit answered this question in the affirmative, and thus denied the petitioners the benefit of qualified immunity notwithstanding a four-to-one split among the only appellate courts that had considered the validity of consent-based strip searches in the prison visitation context. Both the importance of the question presented and the Seventh Circuit's disturbing way of answering it make this case appropriate for review.

In the Seventh Circuit's judgment, public officials do not enjoy an "automatic safe harbor" from damages when the relevant precedents are split as to the legality of the conduct at issue. Appendix, *infra*, at App. 6. Instead, qualified immunity will attach under such circumstances only if it was "reasonably possible" for the official to believe his conduct would be upheld by the controlling circuit or the Supreme Court. App. 6-7. In other words, when a split in authority exists, public officials must guess, at their financial peril, which side of a legal dispute the Supreme Court or the governing circuit would likely take.

The guessing games required under the Seventh Circuit's "reasonably possible" test have no place in the qualified immunity analysis. Although this Court has not decided whether an official may be denied qualified immunity in the face of a division in authority,[5] a recent decision points to the conclusion that in such circumstances the defense must be sustained. In the Fourth Amendment media ride-along case decided last term, the Court observed:

> Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. [Citations omitted]. *If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the wrong side of the controversy.*

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[5] The Third and Tenth Circuits have found the law to be clearly established in cases where, prior to the defendants' conduct, the courts had been split one-to-one on the legality of the conduct. *See Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996); *Garcia by Garcia v. Miera*, 817 F.2d 650, 657-58 (10th Cir. 1987). The Fifth, Eighth, and Ninth Circuits, on the other hand, have expressed doubt on whether the law can be clearly established when (1) no controlling precedent is available and (2) other courts are in conflict. *See McDuffie v. Estelle*, 935 F.2d 682, 689 (5th Cir. 1991); *McMorrow v. Little*, 109 F.3d 432, 434-35 (8th Cir. 1997); *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989). *See also* R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What Do Justice and Efficiency Require?*, 49 Syracuse L. Rev. 1, 22 (1998) ("Nor is the law clear on such basic matters as whether a split in the federal circuit courts necessarily means that the law is not clearly established for qualified immunity purposes.").

Wilson, 526 U.S. at 618 (emphasis added). If the development of a split among the courts *after* the events in question renders the imposition of money damages unfair, then a split among the courts that existed *before* the events in question *a fortiori* does so as well. *See also Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991) ("[s]ince qualified immunity is appropriate if reasonable officers could disagree on the relevant issue [citation omitted], it surely must be appropriate when reasonable jurists can do so").

The *Wilson* Court's sentiment is consistent with the long-standing view that public officials should not be "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *see also Harlow*, 457 U.S. at 818; *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Legal uncertainty is at its height when the prevailing caselaw reflects disagreement on an issue of constitutional law, so that even legal scholars have difficulty predicting how controlling jurisdictions will resolve issues under such circumstances. *See Wood v. Strickland*, 420 U.S. 308, 329 (1975) (Powell, J., dissenting) ("One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'"). It follows that a conflict among appellate authorities on a constitutional matter *necessarily* renders the law sufficiently uncertain for purposes of a qualified immunity defense. *Cf. Braxton v. United States*, 500 U.S. 344, 347 (1991) (one of the primary reasons this Court exercises its *certiorari* jurisdiction is to

"resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law").

The Seventh Circuit's opinion casts these considerations aside and demands that public officials have the legal acumen of constitutional scholars. In the court of appeals' view, officials should be expected to predict whether it would be "reasonably possible" that a controlling authority would find the conduct in question to be constitutional. One would think it is *always* reasonably possible to draw such a conclusion when the cases on point are divided. But as far as the Seventh Circuit is concerned, this is not so. In the instant case, for example, the petitioners have been penalized for their failure to predict that the Seventh Circuit would adopt the view of four federal circuits, rather than that of a state supreme court,[6] on an issue of Fourth Amendment jurisprudence that this Court has never addressed. Put another way, the petitioners have been denied qualified immunity because they failed to "predict the future course of constitutional law." *Pierson*, 386 U.S. at 557.

This Court's qualified immunity decisions consistently instruct that officials should not be held liable for failing to predict the evolution of constitutional law. In this case the Seventh Circuit failed to heed this teaching, and its

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[6] As this Court has often observed, state courts and lower federal courts are equally competent to decide issues arising under the federal Constitution. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *Howlett v. Rose*, 496 U.S. 356, 367-69 (1990).

opinion threatens to undermine the proper functioning of the qualified immunity doctrine. Because qualified immunity is a vital defense to public officials in civil rights litigation, this Court should grant *certiorari* to determine the meaning of "clearly established law" in cases where the conduct at issue has been the subject of a split in legal authority.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3567

JESS BURGESS and MARILYN THOMPKINS,

Plaintiffs-Appellees,

v.

LOUIS LOWERY, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 97-1244—**Joe Billy McDade**, *Chief Judge.*

ARGUED SEPTEMBER 13, 1999—DECIDED JANUARY 18, 2000

Before POSNER, *Chief Judge*, and CUDAHY and KANNE, *Circuit Judges.*

POSNER, *Chief Judge.* The plaintiffs, respectively the father and wife of inmates on death row in an Illinois prison, brought suit in federal district court against prison officials who forced each of the plaintiffs to submit to a strip search as a condition of being permitted to visit the inmate. Illinois prison regulations authorize strip searches of visitors only if the visitor consents *and* there is reasonable suspicion that he is carrying contraband. 20 Ill. Adm. Code § 501.220(a)(3). The regulations apply indifferently to visitors to death-row inmates and to visitors to other inmates. The plaintiffs signed the consent form

but claim that the defendants had no reasonable basis for suspicion that they were carrying contraband and that consequently the searches violated the Fourth Amendment, which has of course been held applicable to state action by virtue of the Fourteenth Amendment. They seek both damages and injunctive relief.

The defendants moved to dismiss, initially complaining that they did have a reasonable suspicion that the plaintiffs were carrying contraband (although the searches did not turn up any); but this was contested and the contest remains unresolved, and so the motion was denied. The defendants appeal the denial on the distinct ground that they have a qualified immunity from a suit for damages because when they conducted the strip searches of the plaintiffs (between 1995 and 1997) the right of a prison visitor to be free from such searches unless the visitor was reasonably suspected of carrying contraband was not yet clearly established. Indeed they claim that it is not clearly established today and that, on the contrary, so long as they have the plaintiffs' consent to the search they are free to conduct it without having any basis at all for suspecting that the search will turn up contraband.

The denial of the motion to dismiss was of course not a final order; but insofar as it subjected the defendants to the threat of damages liability, they were entitled to appeal immediately for the purpose of showing, if they could, that the uncontested facts (namely that the plaintiffs were prison visitors who signed a consent form for a strip search) established immunity from damages. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); *Zorzi v. County of Putnam*, 30 F.3d 885, 891 (7th Cir. 1994). It is irrelevant that the suit also seeks injunctive relief. There is no immunity from a suit for such relief, but a plaintiff cannot block a defendant's right to take an immediate appeal from a ruling that the defendant lacks immunity from a damages judgment merely by asking for injunctive

relief as well as damages. E.g., *Scott v. Lacy*, 811 F.2d 1153 (7th Cir. 1987) (per curiam); *DiMartini v. Ferrin*, 889 F.2d 922, 924-25 (1989), amended on other grounds, 906 F.2d 465 (9th Cir. 1990); *Acierno v. Cloutier*, 40 F.3d 597, 608-09 (3d Cir. 1994) (en banc); see also *Behrens v. Pelletier*, 516 U.S. 299, 306, 312-13 (1996).

The defendants cannot argue on this appeal that the challenged searches were in compliance with the regulations because based on reasonable suspicion; that argument would involve a factual contest and we have no jurisdiction to consider a basis for immunity that depends on an unresolved factual dispute. *Johnson v. Jones*, 515 U.S. 304, 313-18 (1995); *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 267 n. 3 (2d Cir. 1999). But the suit is not for violation of the regulations (there would in any event be no basis for federal jurisdiction of such a suit); it is for violation of the Constitution; and the defendants are free to argue that reasonable suspicion is not (or was not when the searches were conducted, but in fact there have been no pertinent changes in the law since then) a constitutional prerequisite to a strip search of a prison visitor.

Neither the Supreme Court nor this court has decided the question, and while the defendants concede that a decision by the Supreme Court, or by this court in the absence of an intercircuit conflict, would sufficiently establish the impropriety of such searches to defeat a defense of immunity, they intimate that without such a decision the defense must be sustained. Neither the concession, except insofar as the reference to a decision by the Supreme Court is concerned, nor the qualification is sound. Even if our court had decided that strip searches of prison visitors were unconstitutional in the absence of reasonable suspicion, there might be enough doubt about the soundness of the decision, whether in light of decisions by other circuits before or after our decision or

of intimations in Supreme Court decisions not squarely on point that our view might be erroneous, to justify the state in believing that the plaintiff's right was not yet "clearly established" within the meaning of the cases on immunity. *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1341 n. 11 (11th Cir. 1998). The Fifth Circuit has held the contrary, *Brady v. Fort Bend County*, 58 F.3d 173, 175 (5th Cir. 1995); *Boddie v. City of Columbus*, 989 F.2d 745, 748 (5th Cir. 1993), but with all respect we cannot believe that its view is correct. Suppose the only relevant case the Fifth Circuit had decided was very old, and every other circuit since had rejected the position taken in the Fifth Circuit's decision. It would be odd in such circumstances to suppose that right *clearly* established even in the Fifth Circuit, given that courts can and not infrequently do overrule decisions that seem clearly out of step with the rest of the legal universe.

Equally, however, the absence of a decision by the Supreme Court or this court cannot be conclusive on the issue whether a right is clearly established in this circuit. There might be no decision in either court simply because the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in the state courts, that no one thought it worthwhile to litigate the issue. E.g., *Anderson v. Romero*, 72 F.3d 518, 526-27 (7th Cir. 1995); *Buonocore v. Harris*, 65 F.3d 347, 356-57 (4th Cir. 1995); cf. *Key v. Grayson*, 179 F.3d 996, 999-1000 (6th Cir. 1999). To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be *certain* to be unable to obtain any damages.

In a long and unbroken series of decisions by our sister circuits stretching back to the early 1980s, it had become

well established long before these defendants subjected these plaintiffs to strip searches that strip searches of prison visitors were unconstitutional in the absence of reasonable suspicion that the visitor was carrying contraband. E.g., *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) (en banc); *Daugherty v. Campbell*, 935 F.2d 780, 787 (6th Cir. 1991); *Cochrane v. Quattrocchi*, 949 F.2d 11 (1st Cir. 1991); *Smothers v. Gibson*, 778 F.2d 470, 473 (8th Cir. 1985); *Thorne v. Jones*, 765 F.2d 1270, 1276-77 (5th Cir. 1985); see also *Varrone v. Bilotti*, 123 F.3d 75, 78-79 (2d Cir. 1997). The defendants seek to distinguish these cases by pointing out that the plaintiffs in them, unlike the plaintiffs in this case, had not signed forms consenting to be strip searched. The defendants are inaccurate. In some cases the plaintiffs had signed consent forms, e.g., *Cochrane v. Quattrochi, supra*, 949 F.2d at 14; *Thorne v. Jones, supra*, 765 F.2d at 1276, while in others consent was implicit. It was implicit because, if a visitor showed up at the gates of the prison and was told that anyone who visits an inmate has to submit to a strip search, and replied that in that event she would not visit him, the guards would not seize her and subject her to the strip search anyway—or if they did, they would be violating the Fourth Amendment, as *Spear* makes clear, 71 F.3d at 632, since a mere refusal to consent would not establish probable cause to believe that the visitor was carrying contraband. The visitor thus always had the legal option of avoiding the strip search by forgoing the visit. And she always knew that if she did not forgo the visit, she would have to submit to the search. Hence, if she went ahead and made the visit, she was implicitly consenting to be searched. Formalizing these options by furnishing the visitor with a consent form does not alter the constitutional issue.

But in addition the defendants point us to two cases by the Supreme Court of Hawaii, decided in 1978 and 1980,

that upheld, against federal constitutional challenges similar to the one mounted by the plaintiffs in this case, strip searches of prison visitors without reasonable suspicion. *State v. Martinez*, 580 P.2d 1282 (Haw. 1978); *State v. Custodio*, 607 P.2d 1048 (Haw. 1980). The plaintiffs riposte that a state supreme court's view of a federal constitutional question should not be given the same weight as a federal court of appeals' view, but this is wrong. State judges like federal judges take an oath to uphold the Constitution of the United States, and unlike the converse case of federal judges enforcing state law, where it is accepted that the ultimate authority on questions of state law resides with state rather than federal courts, the federal courts of appeals do not have the ultimate authority to decide issues of federal law. That authority resides in the Supreme Court of the United States. And if federal judges are more sympathetic to federal constitutional rights than state judges are, then it is no doubt equally the case that federal judges are less sympathetic to state interests than state judges are; and since the scope of federal constitutional rights against state action is determined by a balancing of the interests of the individual against the interests of the community, there is no basis for an a priori belief that federal judges have a superior perspective on the scope of federal constitutional rights to that of state judges. See Paul M. Bator, "The State Courts and Federal Constitutional Litigation," 22 *Wm. & Mary L. Rev.* 605, 631-35 (1981).

But we do not think that it can be the law of official immunity that one contrary decision at either the federal court of appeals or the state supreme court level (or, for that matter, two or more decisions by the same federal court of appeals or state supreme court) provides an automatic safe harbor. *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996); *Garcia by Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987). The test, formulated with particular ap-

plication to this case, ought to be whether a reasonable official in the position of these defendants, considering all relevant sources of guidance to the law, might have thought it reasonably possible that this court or eventually the U.S. Supreme Court would hold that strip searches of prison visitors are proper even without reasonable suspicion.

Wilson v. Layne, 119 S. Ct. 1692, 1699-1701 (1999), the Supreme Court's latest word on immunity, is not to the contrary. The question at issue in that case—whether it violates the Fourth Amendment for the police to bring along a reporter when making an arrest—had not, when the arrest in question took place, been the subject of a reported decision, apart from one intermediate state court decision. A federal court of appeals decision rendered shortly before the arrest provided some support for the plaintiff's position, but was distinguishable on its facts (the guest in that case was a private security guard, not a reporter). The Court did not lay down a "safe harbor" rule. It left undisturbed the standard of *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The relevant sources of law from which perception of those contours is derived include not only cases on point but also the constitutional tradition that generates those decisions. In part at least the defendants accept this proposition, because they ask us to apply the doctrine of unconstitutional conditions to this case, even though it has not surfaced in any previous decision dealing with strip searches. But they go further, arguing that because the doctrine was not mentioned in the previous cases on which the plaintiffs rely to show that the right sought to be enforced in this case is well established, those cases are not authority for the plaintiffs' position. This is clearly wrong, though we can find no case on the question, because it would mean that any

time a state official could think of an argument for some position that had not been mentioned in a previous decision the contrary of that position could not be considered established in law. Decisions would have no authority if their writ ran only to the arguments explicitly discussed in them.

Still, the defendants are free to urge us to reject the decisions in the other circuits on the basis of the doctrine of unconstitutional conditions, and even if they do not convince us, if they can create enough doubt to show that the right on which this suit is predicated cannot be deemed clearly established, they will have won on immunity, though they will remain subject to being enjoined. So let us consider that doctrine. When we say that the defendants appeal to it, we really mean they appeal to its predecessor, the doctrine memorably stated by Justice Holmes that it is not a constitutional violation to condition a benefit on the waiver of a constitutional right. *McAuliffe v. Mayor, Etc., of City of New Bedford*, 29 N.E. 517 (Mass. 1892). On this view, a rule denying free speech to police officers is valid because it does not really deny free speech; it merely asks the would-be officer to decide whether he would rather speak freely or be a police officer. Note, "Unconstitutional Conditions," 73 *Harv. L. Rev.* 1595 (1960). Later cases rejected the Holmesian doctrine and held that conditions, as well as outright prohibitions, can be unconstitutional. E.g., *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996). The clearest case is where the condition is discriminatory. No one has a right to visit an aircraft carrier, but if the Navy allowed everyone except Jews to visit its aircraft carriers it would be denying the equal protection of the laws. But that is *too* clear a case, because the equal protection clause is not about rights, but about equal treatment. Where rights are involved, it is easy to imagine cases in which conditioning is a lesser infringement than prohibiting. People who

work for the CIA accept that they will have less freedom of speech than if they worked for McDonald's, but since the condition is a reasonable one the restriction on their freedom of speech is not considered unconstitutional. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam).

What the law of "unconstitutional conditions" boils down to, so far as it might be thought to help governments seeking to curtail the usual freedoms—in which application it ought to be called something like the doctrine of "constitutional conditioning"—is simply that conditions can lawfully be imposed on the receipt of a benefit—conditions that may include the surrender of a constitutional right, such as the right to be free from unreasonable searches and seizures—provided the conditions are reasonable. This was the approach that the district judge took in this case, and the fact that he didn't mention the doctrine of unconstitutional conditions in evaluating the state's arguments can hardly matter, especially since the doctrine is invariably viewed as a basis for invalidating, not defending, challenged governmental action.

Clearly it is reasonable, regardless of the doctrinal rubric, for the government to require airline passengers to step through a metal detector even though there is no reasonable suspicion that a given passenger is carrying a weapon. In part because the search is not intrusive, and in part because of the danger that an armed passenger poses on an airplane in flight, this condition on the right to travel by air is reasonable. *Edmond v. Goldsmith*, 183 F.3d 659, 664 (7th Cir. 1999). Similar conditions are imposed in other administrative-search contexts, to which the search of prison visitors can be analogized. (Some are the converse of the prison-visit case, as where having to submit to inspections by unwanted "visitors" is upheld as a condition of owning rental property. *Platteville Area*

Apartment Ass'n v. City of Platteville, 179 F.3d 574 (7th Cir. 1999).) We can imagine an argument that death-row prisoners and their families are so desperate that requiring reasonable suspicion as a condition of subjecting visitors to a strip search provides insufficient protection against escape or suicide, but that argument is not made here; the defendants seek to defend their practice without regard to the inmate's crime or punishment.

That choice of grounds is fatal. Whatever may be the case with prisoners on death row, a general conditioning of prison visitation on subjection to a strip search is manifestly unreasonable. The prisoners themselves are subjected to such searches before the visit, and, if the prison wants, after the visit as well (which is in fact the defendants' unchallenged practice with respect to prisoners on death row), 20 Ill. Admin. Code § 501.220(b)(1), and the visitation is under continuous surveillance by guards. Whether or not there is a constitutional right either to visit a prisoner, or to be visited in a prison (on which see, e.g., *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460-61 (1989); *Froehlich v. Wisconsin*, 196 F.3d 800 (7th Cir. 1999); *Spear v. Sowders*, *supra*, 71 F.3d at 630), visits are something greatly valued both by the prisoners and by their visitors (and perhaps especially by prisoners on death row), so that the defendants' practice puts the visitors to a very painful choice—unnecessarily so, judging by the state's own regulations, which require reasonable suspicion as a predicate to conditioning a prison visit on submission to a strip search. Cf. *Daugherty v. Campbell*, *supra*, 935 F.2d at 787 n. 7. In these circumstances, the costs of the defendants' practice seems clearly to exceed the benefits, and by a wide margin. This scotches their argument that it is a constitutional practice, and in combination with the great weight of the case authority (the Hawaiian cases having come at the very outset of the case development, so that one may doubt whether they would

be followed by the Supreme Court of Hawaii today, two decades later) shows that the right upon which these plaintiffs are suing was clearly established at the time that the conduct that is complained of occurred, thus defeating the defense of immunity and requiring that the judge's ruling be

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Entered September 4, 1998]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

JESS BURGESS and MARILYN THOMPKINS,	)	
Plaintiffs,	)	No. 97-1244
	)	Judge
vs.	)	Joe B. McDade
	)	
Pontiac Correctional Center Assistant Warden LOUIS LOWERY; Sergeant WILL LIVINGSTON; and Correctional Officers BROOKS and GREGORY, in their individual capacities; and Warden JERRY GILMORE, in his official capacity,	)	
Defendants.	)	

ORDER

This is a civil rights case brought by Plaintiffs, Jess Burgess and Marilyn Thompkins, pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 1983 *et seq.*, and the Fourth Amendment to the United States Constitution. Plaintiffs also assert state law tort claims for intentional infliction of emotional distress under the supplementary jurisdiction of this Court, pursuant to 28 U.S.C. § 1367. Plaintiffs allege that Defendants, Assistant Warden Louis Lowery, Sergeant Will Livingston, and Correctional Officers Brooks and Gregory, in their individual capacities, and Warden Jerry Gilmore, in his official capacity, conspired to and did deprive Plaintiffs of their Fourth Amendment rights by strip searching

them, without reasonable suspicion for such a search, when they visited their incarcerated relatives at the Pontiac Correctional Center ("Pontiac"). Plaintiffs contend that random strip searches, such as those they experienced, are ongoing at Pontiac, are unconstitutional, and should be enjoined by this Court. Plaintiffs also seek monetary damages for the violation of their constitutional rights.

The parties have filed several motions in this case, and several orders have been issued. Currently, Defendants are subject to an injunction, issued by this Court on March 20, 1998, which requires Defendants to refrain from conducting strip searches on Plaintiffs unless they have a reasonable suspicion that Plaintiffs are concealing contraband during the course of their visits to the Pontiac Correctional Center. Presently before the Court is Defendants' Motion for Summary Judgment. Defendants seek an initial finding that they are entitled to qualified immunity for the strip searches they performed on Plaintiffs. If the Court denies them qualified immunity, Defendants claim that they are entitled to judgment as a matter of law on the issue of reasonable suspicion, namely, that Defendants had, on the undisputed facts, a "reasonable suspicion" for the strip searches and that these searches were constitutional, as a result. Not surprisingly, Plaintiffs oppose the entry of judgment in Defendants' favor and argue that Defendants are not entitled to qualified immunity, nor to judgment as a matter of law.

After reviewing the pleadings and the relevant case law, the Court ordered supplemental briefing on the effect of the consent forms signed by Plaintiffs prior to the strip searches. The Court has reviewed all the

pleadings now, and it agrees with Plaintiffs, with one exception: Warden Gilmore is entitled to judgment as a matter of law, but the other Defendants are not, nor are they entitled to qualified immunity. Moreover, based on the facts in this record, there are several genuine questions of material fact on the merits of Plaintiffs' claims that need to be resolved by the trier of fact. Accordingly, the Court denies summary judgment for all Defendants, except Warden Gilmore, on all grounds.

DISCUSSION

In this case, Plaintiffs' Complaint clearly states claims in Counts I and II for violation of their Fourth Amendment rights to be free from unreasonable searches (¶ 27 (Burgess) and ¶31 (Thompkins)). Defendants assert the defense of qualified immunity, and, alternatively, they seek summary judgment in their favor on Counts I and II.[1] The issues in this case are (relatively) straightforward (although not simple), namely, whether Defendants have qualified immunity for their strip searches of Plaintiffs, and, if not, whether reasonable suspicion existed for the strip searches of Plaintiffs. The facts in this case are as follows.

I. Facts

Plaintiffs in this case complain that they were subjected to unconstitutional strip searches at Pontiac by

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[1] Defendants' Motion for Summary Judgment is really a motion for partial summary judgment, since the motion does not purport to challenge the state law claims for intentional infliction of emotional distress alleged in Counts III and IV.

correctional officials. Plaintiffs are relatives of inmates in the prison's "condemned unit." On several occasions in 1997, Plaintiffs sought to visit their relatives, but they were told that in order to obtain such a visit, they would need to sign consent forms to be strip searched and that failure to consent to such searches would result in suspension of visitation privileges for at least that day and perhaps for a longer period of time. Plaintiffs agreed to these searches and signed the consent forms. Defendant prison officials found no contraband on Plaintiffs, and Plaintiffs gained entry into the prison to visit their relatives.

Defendants assert that the strip searches of Plaintiffs were motivated by reasonable suspicions that Plaintiffs were carrying contraband on their persons which they intended to smuggle into the prison to their inmate relatives. The facts alleged by Defendants as the basis for the assertion of reasonable suspicion are material to the issues in this case. These facts are as follows.

A. Jess Burgess

Plaintiff, Jess Burgess ("Burgess"), is a 54 year old computer operator and a resident of Silvis, Illinois. (Order of 3/20/98 at 5). Burgess has never been arrested or imprisoned. *Id.* Mr. Burgess and his wife have visited their son approximately twice a month for the past three years at Pontiac without incident. *Id.* He and his wife are virtually the only visitors who travel to Pontiac to see their son. *Id.* On or about April 19, 1997, Mr. Burgess went to the Pontiac Correctional Center to visit his son. Defendant Livingston, the correctional officer assigned to search incoming visitors, took Mr. Burgess

into what is called the "shakedown room," shut the door, and, without conducting a patdown search, instructed Mr. Burgess to sign a consent form to a strip search. *Id. See also* Pls. Add'l Facts/Defs. Resp. ¶ 48. Mr. Burgess was told, at a minimum, that his refusal to consent to the search would result in the loss of visiting privileges for the day. (Defs. Stmt./Pls. Resp. ¶ 16). Mr. Burgess signed the consent form. *Id.* ¶ 14. Officer Livingston then strip searched Mr. Burgess.[2] (Pl. Add'l Facts/Defs. Resp. ¶ 32). Officer Livingston found no contraband on Mr. Burgess' person. *Id.* ¶ 35.

Officer Livingston conducted this strip search after receiving instructions from Assistant Warden Lowery on April 19, 1997, to do so. *Id.* ¶ 37. Assistant Warden Lowery has testified that he issued this directive based on information he received on or about March 25, 1995, in an envelope. In this envelope was an intercepted letter from prisoner Ray Burgess addressed to his mother, Helen, which stated: "Mom, Call Dad as soon as you get this. He has to be here on Saturday 3/22/97 before noon. Make sure he understands that he has to be here. Love, Ray." The envelope also contained a letter to his father, Jess, stating: "Dad, You need to come see me this Saturday, March 22nd. This Saturday! Ray." *Id.* ¶ 36. Warden Lowery testified that this letter

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[2] This strip search was humiliating for Mr. Burgess. Plaintiffs allege that Officer Livingston instructed Mr. Burgess to remove every article of clothing he was wearing, and when he did, officer Livingston visually inspected Mr. Burgess' unclothed body, front and back, and required Mr. Burgess to lift his testicles, turn around, squat and cough and to open his mouth and lift his tongue, all while unclothed. (Order of 3/20/98 at 6).

alone was the basis for his order to strip search Mr. Burgess, and that he did not conduct any other investigation into the matter. Assistant Warden Lowery did, however, place a "flag" or comment into the prison's computers next to Jess and Helen Burgess' names and told the guards at the gatehouse to notify him whenever Ray Burgess received a visitor. Assistant Warden Lowery also testified that he had no information that Ray Burgess used or trafficked in drugs. *Id.* ¶ 43. Officer Livingston testified that he knew Ray Burgess, and he did not ever know him to possess contraband. *Id.* ¶ 44.

B. Marilyn Thompkins

Plaintiff, Marilyn Thompkins ("Thompkins"), is a full-time employee in a retail store, a resident of Springfield, Illinois, and married to a prisoner, Willie Thompkins, in the condemned unit at the IDOC's Pontiac Correctional Center. (Order of 3/20/98 at 7). Mrs. Thompkins has never been arrested and has visited her husband, without incident, for approximately two years. *Id.* Before filing this lawsuit, Mrs. Thompkins was strip searched by Pontiac officials on four separate occasions: September 10, 1995; September 28, 1995; November 11, 1995; and January 22, 1996. Officer Michelle Brooks strip searched Ms. Thompkins on September 10, 1995; and Officer Latosha Lindsay searched Mrs. Thompkins on September 28, 1995, and January 26, 1996. (Pls. Add'l Facts/Defs. Resp. ¶¶ 1, 4). The record does not indicate which official searched Mrs. Thompkins on November 11, 1995. Assistant Warden Lowery admits that he ordered four separate searches of Mrs. Thomp-

kins. He testified that he ordered the searches based on an "overheard telephone call." *Id.* ¶ 8. According to Assistant Warden Lowery, an unidentified officer phoned him to say that while conducting routine monitoring of prisoner calls, this officer overheard prisoner Willie Thompkins making a telephone call to an unidentified woman. Willie Thompkins then said to this woman: "This is the way you do it. They will not—you do it this way here, and they will not—they'll have—they will not find it or they'll have a hard time finding it by doing it this way." *Id.* ¶ 9. In the alleged overhear, "it" was never defined, nor was the Pontiac Correctional Center mentioned. *Id.* ¶ 10. Assistant Warden Lowery testified that he did not overhear the alleged telephone call; that he does not know the date, month, year, or season of the alleged overhear; and he does not know the name of the officer who told him about it. *Id.* ¶ 12. Assistant Warden Lowery also admits that he does not know the name of the woman that Mr. Thompkins was talking to on the phone. *Id.* ¶ 13. There was no documentation of the alleged overhear, and no tape recording of the phone call. *Id.* ¶¶ 16, 19. Assistant Warden Lowery testified that he entered a "flag" into the prison computers next to Willie Thompkins' name, and he instructed the gatehouse guards to notify him when Mr. Thompkins received a visitor. *Id.* ¶ 22. Printouts do not reveal such a flag. *Id.* Assistant Warden Lowery did not conduct any further investigation into the telephone call, and he received no additional information in this regard. *Id.* ¶ 24. Assistant Warden Lowery is aware that Mrs. Thompkins has no involvement with drugs and no criminal record. *Id.* ¶ 29. He also knows Mr. Thompkins, and he has never know Mr. Thompkins to

use or traffic in drugs. *Id.* ¶ 30. Assistant Warden Lowery testified that the alleged overhear is the only basis upon which he ordered the four strip searches of Mrs. Thompkins, and that this overhear would, in his mind, justify future strip searches of Mrs. Thompkins. *Id.* ¶ 31.

C. Contested Facts

IDOC has an express policy on strip searches. *See* IDOC Rule 501(C). The parties dispute whether this procedure was followed. (Defs. Stmt./Pls. Resp. ¶ 5). Defendants contend that they followed all departmental rules and regulations with regard to the searches, namely, that they possessed reasonable suspicion and obtained each person's consent before conducting the searches. Plaintiffs contest that the departmental procedures were followed, asserting that there was no basis for a reasonable suspicion and that Plaintiffs, although they signed consent forms, did not do so willingly and voluntarily. (Def. Stmt. ¶¶ 5, 6). Defendants contend that Warden Gilmore did not order random strip searches of Plaintiffs, did not observe or direct his staff to conduct such strip searches, and did not have any personal knowledge of Plaintiffs or the searches. Plaintiffs contest these assertions as self-serving and conclusory, but they offer no evidence to refute them.

Defendants further contend that Defendant Lowery is solely responsible for the searches and assert that Defendants Gilmore, Brooks Lindsay and Livingston are not responsible. Plaintiffs assert that all of these Defendants played a roll in the searches and all are responsible. (Def. Stmt. ¶6).

More significantly, the parties dispute whether Assistant Warden Lowery ordered the strip search of Plaintiff Burgess after a letter from Inmate Burgess to his father was intercepted by the mail room. (Def. Stmt. ¶¶ 7-8). This dispute requires some explanation, given that the parties agree on the fact that: (1) Burgess sent his father a letter specifically instructing Burgess' father to visit Burgess at Pontiac at a particular time (before noon) on a particular day (3/22/97); and (2) Assistant Warden Lowery strip searched Jess Burgess on April 19, 1997. Essentially, Plaintiffs dispute the cause and effect of the April 19, 1997 search, *i.e.*, they dispute that Assistant Warden Lowery ordered the strip search on April 19, 1997, because he intercepted the Burgess letter regarding the March 22, 1997, visit.[3] Similarly, there is a significant dispute of fact regarding whether or not Defendants actually ever intercepted and recorded a telephone conversation between Inmate Thompkins and a female caller in which Thompkins explained to the female how to smuggle contraband into the prison. (Def. Stmt. ¶¶ 10-11).

Finally, there are two additional disputes of tangential significance: (1) the parties contest the effect of the consent forms that were undisputably signed by Plaintiffs prior to the searches; and (2) the parties contest the actual effect of a refusal to sign such a consent form, *i.e.*, Defendants assert that a refusal merely results in the denial of prison visitation rights for the day

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[3] It is unclear why Assistant Warden Lowery used the March 22, 1997 visit and this letter as a basis for his directive to search Burgess' father on his next visit to the prison, April 19, 1997. Why would the letter create a reasonable suspicion about a visit on a different day at a different time?

when the refusal is given; Plaintiffs believe that visitors may lose all future visiting privileges. (Def. Stmt. ¶ 16).

II. Analysis

This court is cognizant that prison officials, such as Defendants in this case, must be given "leeway" to conduct searches of visitors who are suspected of smuggling contraband into the prison. "Visitors can be subjected to some searches, such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion." *See Spear v. Sowders*, 71 F.3d 626, 629 (6th Cir. 1995) (noting the wealth of cases which recognize the need to give prison officials wide latitude in running their institutions given the grave danger of its inhabitants and the rampant problems associated with the smuggling of contraband into and out of these prisons). Strip searches, however, pose a much greater intrusion into a visitor's privacy and liberty interests, and thus must be justified by reasonable suspicion. This balancing of the penal institution's security concerns, with the concerns of individuals for their privacy, is the task before this Court on summary judgment.

When faced with a motion that includes arguments on both the substance of the plaintiff's claims and qualified immunity, a court should first address those arguments directed to substance. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (initial inquiry in qualified immunity determinations is "whether the plaintiff has asserted a violation of a constitutional right at all"). Once the court has determined that a viable constitutional claim has been made, it examines the applicability of qualified immunity on that claim.

The Court has conducted this initial, threshold inquiry and determined that Plaintiffs have stated a viable constitutional claim, namely, the right to be free from unreasonable, random strip searches. This right arises out of the Fourth Amendment's protection of persons, as applied to the States by the Fourteenth Amendment, from "unreasonable searches and seizures." *See generally Terry v. Ohio*, 392 U.S. 1 (1968). The civil rights statute, 42 U.S.C. § 1983, protects individual persons from such conduct by state officials.

A. Qualified Immunity

Having found that a constitutional claim has been stated, the next question is whether Defendants are entitled to qualified immunity. Government officials sued in their individual capacities are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To be constitutional under the Fourth Amendment, the conduct in question here, the strip search, had to be supported by a reasonable suspicion of wrongdoing by the persons searched. In other words, when persons who are suspected of carrying contraband seek to visit prison inmates, the standard of determining whether a strip search is "reasonable" or not is whether the officers performing the search had "reasonable suspicion" to conduct it. *See Varrone v. Bilotti*, 123 F.3d 75, 80 (2d Cir. 1997) (prison official had "reasonable grounds for suspecting" that a search of inmate's visitor would reveal contraband); *Daugherty v. Campbell*, 935 F.2d 780,

782 (6th Cir. 1991) (plaintiff had a clearly established Fourth Amendment right to be free of any search of her person absent a finding of reasonable suspicion by a prison official); *Spear v. Sowders*, 71 F.3d 626, 630-31 (6th Cir. 1995) (same, citing cases from three circuits which hold that reasonable suspicion is the standard for strip searches); *Blackburn v. Snow*, 771 F.2d 556, 565 (1st Cir. 1985) (same); *Thorn v. Jones*, 765 F.2d 1270, 1277 (5th Cir. 1985) (same); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (same). In the Seventh Circuit, reasonable suspicion is the standard for strip searches in other contexts. A sample of cases reaching this conclusion are: *Bridgman By and Through Bridgman v. New Trier High School Dist. No. 203*, 128 F.3d 1146 (7th Cir. 1997); *Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995); *U.S. v. Johnson*, 991 F.2d 1287 (7th Cir. 1993); *Scoby v. Neal*, 981 F.2d 286 (7th Cir. 1992); *Sheilds v. Burge*, 874 F.2d 1201 (7th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272-73 (7th Cir. 1983) (strip search of arrestee requires reasonable suspicion). Qualified immunity is an affirmative defense, and the defendants always bear the burden of showing that the challenged conduct was objectively reasonable in light of the existing law at that time. *Harlow*, 457 U.S. at 815.

The Sixth Circuit has held that the law is "clearly established" if the circuit's decisions "clearly foreshadow" a particular ruling on the issue, and/or if decisions of other circuits make the challenged conduct unconstitutional. Given the wealth of precedent in the Seventh Circuit—which holds that strip searches, in general, are subject to a reasonable suspicion standard—and cases from at least four other circuits holding that strip

searches of prison visitors are subject to that same standard, this Court finds that the law regarding the strip searches in this case was clearly established. In other words, Defendants needed reasonable suspicion to search Plaintiffs before requiring Plaintiffs to sign a consent form and then searching them. *See Risk v. Sexton*, 1996 U.S. Dist. LEXIS 20970 (W.D. Mich. 1996) (relying on *Spear* and *Daugherty*, court found that reasonable suspicion must exist before a strip search can be conducted based on consent forms signed by the persons to be searched).[4]

B. The Merits

Having found that the standard of reasonable suspicion was clearly established at the time of the searches, the question is whether the facts of this case create a basis for reasonable suspicion, from the viewpoint of a reasonable person. Although the determination of whether qualified immunity is applicable to an official's actions is a question of law, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the determination of reasonableness is fact specific. In this case, those facts preclude a determination of qualified immunity.

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[4] The Court finds the decision in *Risk* very well reasoned, especially with respect to the issue of how consent forms, obtained by the specter of suspended visiting privileges, affects the constitutionality of the search, itself. Clearly, the voluntariness of the consent is suspect under such circumstances, however, voluntary or not, a consent is a consent. The Court finds that the solution reached in *Risk*, namely, that the question of whether there is reasonable suspicion at all, precedes any question about the effect of a consent form, is the best way to approach the facts in this case.

"Reasonable suspicion" has been defined as "something stronger than a mere hunch, but something weaker than probable cause." *See Varrone*, 123 F.3d at 79 (*quoting Wood v. Clemons*, 89 F.3d 922, 929 (1st Cir. 1996)). "Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence." *Spear*, 71 F.3d at 631.

> To establish reasonable suspicion, "prison officials must point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience." Hunter, 672 F.2d at 674. The standard requires "individualized suspicion, specifically directed to the person who is targeted for the strip search." Id. at 675. In determining whether reasonable suspicion existed, the factors that may be considered include: "(1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other factors contributing to suspicion or lack thereof." Security and Law Enforcement Employees, 737 F.2d at 205. In making that determination, it is important to keep in mind that "[t]he day-to-day problems of administering and operating correctional facilities are demanding and complex and this reality must be accorded some weight by federal courts even when confronted with constitutional challenges." Id; see also Bell v. Wolfish, 441 U.S. 520, 547 (1979).

See e.g., *Varrone*, 123 F.3d at 79.

Given this standard, the question, then, is whether a reasonable person, seeing what Defendants saw and

hearing what Defendants heard, would believe that reasonable suspicion existed which justified the searches that took place. This question, however, conflates the question of qualified immunity with the question on the merits, namely, whether reasonable suspicion for the searches, in fact, existed (*i.e.*, whether a reasonable person believed there was a reasonable suspicion, and whether a reasonable suspicion actually existed). Both questions boil down to a straightforward analysis of whether facts in the record support a legal determination of reasonableness for the search. Because the facts in this case regarding reasonableness are contested, qualified immunity must be denied for all Defendants, and summary judgment must be denied, except with respect to Warden Gilmore.[5] Our application of the facts of *Daugherty v. Campbell*, 935 F.2d 780 (6th Cir. 1991); *Spears v. Sowders*, 71 F.3d 626 (6th Cir. 1991); and *Varrone v. Bilotti*, 123 F.3d 75 (2nd Cir. 1997), cases involving prison officials who conducted strip searches of prison visitors, convinces the Court that this is the right course of action.

In *Daugherty*, the Sixth Circuit reversed the jury's verdict for the defendant and granted the plaintiff's motion for judgment as a matter of law. The plaintiff in that case went to the prison to visit her husband who was an inmate at the facility. A corrections officer told the warden that the plaintiff had been smuggling drugs into the prison by concealing them on her person. The

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[5] The Court's analysis, below, however, should give the parties some indication that it finds the government's case extremely weak and that a finding of unreasonableness might be warranted, as a matter of law.

warden also received an anonymous letter and another letter, signed with a false name, stating that the plaintiff was smuggling drugs into the prison. The warden ordered a strip search of the plaintiff, prior to any visit with her husband, and a search of her vehicle. The Sixth Circuit held that there was no reasonable suspicion present which could provide a basis for a search of the plaintiff. The warden relied solely on the uncorroborated statement of the correctional officer which was nothing more than a general statement based on no objective facts. *Id.* at 557. The plaintiff had never been suspected of smuggling activity over the two year period she had been visiting her husband in prison, nor had her husband ever been involved with drugs at the facility. Further, the unsubstantiated letters did not provide reasonable suspicion. The court found that without independent objective information to support the correction officer's conclusions, reasonable suspicion did not exist to authorize a strip search of a prison visitor. The court noted that the status of the accuser, a corrections officer, did not provide reasonable grounds for suspicion absent independent evidence to support the alleged tip. The court concluded that because there was insufficient evidence to constitute reasonable suspicion, it was not necessary to address the defendants' contention that the plaintiff had consented to the search.

In *Spear*, the Sixth Circuit held that the defendants were entitled to dismissal of the complaint alleging a wrongful strip search of a prison visitor, because reasonable suspicion did exist for the search. The plaintiff was strip searched after a reliable prison informant informed officials that an inmate "was receiving drugs

every time a young unrelated female visitor visited." The only unrelated female visitor to visit that inmate was the plaintiff. Moreover, the inmate was a known drug abuser within the prison. It was known that on at least four occasions someone had smuggled drugs into the prison which came into the inmate's possession. On these facts, the court concluded that reasonable suspicion did exist to authorize the strip search of the plaintiff.

In *Varrone*, the Circuit Court granted qualified immunity to the defendants on facts that were much stronger than the facts in this case. In *Varrone*, a district attorney, then Deputy Chief of the Narcotics Bureau, called the Inspector General for the Department of Correctional Services and told the Inspector that "he had received information from what he believed to be a reliable source that Anthony Varrone and Claire Varrone would be visiting Joseph Varrone, their father and husband, then an inmate at the Arthur Kill Correctional Facility ("Arthur Kill") in the near future and that, at such time, they would be bringing heroin into the facility." 123 F.3d at 77. Based upon this information, the Inspector ran an independent check on Joseph Varrone and learned that he was incarcerated for selling a controlled substance. The Inspector was also aware that there were other alleged instances of drug smuggling into Arthur Kill. Based upon all of this information, the Investigator ordered a strip search of Claire and Anthony Varrone on their next visits. *Id.* The order was passed down through various levels of officials and ultimately several correctional officials conducted the searches. *Id.*

The Court of Appeals reversed a district court's decision to deny qualified immunity. The district court held that, for purposes of qualified immunity, it was clearly established that strip searches of prison visitors could be made only when based upon reasonable suspicion. The court stated that a visitor's signed consent to a search, which is a condition of visitation was involuntary and did not constitute a waiver of Fourth Amendment rights. *Id.* at 78. The district court denied qualified immunity based, *inter alia*, on its finding that the defendants had not assessed whether reasonable suspicion existed to search the Varrones. *Id.*

The Court of Appeals reversed, holding, *inter alia*, that the law was not only clearly established with regard to reasonable suspicion, but the defendants in this case, from the investigator down, had it when they strip searched the plaintiffs. Specifically, the Circuit Court found that the information given to the investigator from the District Attorney, not only provided a "very likely" basis for reasonable suspicion, itself, but most certainly gave the Investigator (and all of those who followed his orders) a reasonable belief that reasonable suspicion existed, for purposes of qualified immunity. The *Varrone* court essentially analyzed the issue this way: the information that the District Attorney received was "precise, specific and detailed." *Id.* at 79. It "identified the smugglers by name, stated where and when they would commit the offense and specified the particular drug they would attempt to smuggle." *Id.* at 80. In addition, the Investigator's own investigation revealed that the inmate at issue was convicted of drug offenses and that the penal institution, itself, was experiencing other allegations of drug smuggling. *Id.* In

other words, the "tip" was not wholly uncorroborated, as it was in *Daugherty v. Campbell*, 935 F.2d 780 (6th Cir. 1991), a case where qualified immunity for a strip search of prison visitors was denied. Note however that the Second Circuit went on to find that reasonable suspicion would have existed even if the Inspector had not personally investigated the tip's reliability. The Court found that such a requirement would "import into the standards governing reasonable suspicion the more stringent standards governing probable cause." *Id.*

Application of the holding of these cases to the facts of this one leads the Court to the following conclusions: Warden Gilmore is entitled to judgment on the merits as a matter of law, and, accordingly, Warden Gilmore's motion for summary judgment is allowed. With respect to Warden Gilmore, Plaintiffs fail to offer any evidence of Warden Gilmore's direct, personal involvement, as required by *Gentry v. Duckworth*, 65 F.3d 555 (7th Cir. 1995). To be held liable under 42 U.S.C. § 1983, a supervisor "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye . . ." *Gentry*, 65 F.3d at 561 (citations omitted). The mere fact that Warden Gilmore is the warden is insufficient to establish liability, because the doctrine of *respondeat superior* does not apply to actions filed under 42 U.S.C. § 1983. *See Pacilli v. DeVito*, 972 F.2d 871 (7th Cir. 1992). Nor have Plaintiffs shown that the strip search occurred at Warden Gilmore's direction or with his knowledge and consent. *Id.*

With regard to the other Defendants, however, the Court finds that the knowledge and personal involvement of these Defendants, together with the lack of

facts justifying a reasonable suspicion for the particular searches in question, requires the Court to deny qualified immunity and summary judgment, principally because the person specific and conduct specific nature of the information justifying the search in *Varrone* is not present here.

In Plaintiff Jess Burgess' situation, although the intercepted letter identified Burgess by name, the letter did not make any reference to suspicious or criminal activity; it merely (albeit desperately) requested a visit from his father on a particular day. Although Assistant Warden Lowery testified that such a request, in his experience, is usually a request to bring contraband to the prison (Defs. Stmt./Pls. Resp. ¶ 8), the letter itself does not mention contraband and there is no other independent evidence to corroborate such a "hunch." For example, prisoner Ray Burgess is not a drug dealer or a drug addict; he has never, to the knowledge of any of Defendants, ever taken drugs or smuggled drugs into the prison; and Jess Burgess is not known by Defendants to have been convicted of a crime or be involved in drugs or smuggling drugs. Reasonable suspicion requires more than a "hunch." Moreover, the actual search took place after the March 22nd visit mentioned in the letter. The Court fails to see, and Defendants have failed to persuade us (as is their burden), why the letter justifies a search after the March 22nd date. In the final analysis, this case presents a much weaker basis for a finding of reasonable suspicion than the facts in *Vallone*, where the court granted qualified immunity, and a weaker case than *Daugherty*, *Spear*, and *Risk*, where the courts denied qualified immunity. This Court will, therefore, deny all Defendants qualified

immunity with respect to Plaintiff Jess Burgess and deny summary judgment on the merits to all Defendants, except Warden Gilmore.

With respect to Plaintiff Marilyn Thompkins, the facts are also weak. Although the overheard phone call in her case seems to allude to something shady, such as the smuggling of contraband, the woman was unidentified, and there is no evidence in the record to suggest that Plaintiff Marilyn Thompkins is the only woman who ever visits Willie Thompkins at Pontiac. Moreover, even if the phone call itself, an "uncorroborated tip" in the nature of the one rejected in *Daugherty*, were sufficient to identify the person and the conduct necessary to give rise to a "reasonable suspicion," this suspicion would necessarily be time specific as well. In other words, the continuing nature of the strip searches, which Defendants readily admit were based on this single phone call, concerns the court. Defendants, in this Court's view, would need reasonable suspicion each time they searched Ms. Thompkins. One phone call, overheard years ago, simply cannot justify a continuing order to search Ms. Thompkins every time she visits her husband at Pontiac. Nonetheless, we find that the overheard phone call, without more, does not constitute a basis for reasonable suspicion based on the facts of the cases discussed above. The Court therefore denies qualified immunity to all Defendants. Summary judgment is granted for Warden Gilmore and denied for the remaining Defendants, on the merits.

CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment (Doc.#12) is DENIED in part and GRANTED in part. The Clerk should enter summary judgment in favor of Warden Gilmore and deny summary judgment with regard to all other Defendants. Qualified Immunity should be denied as to all Defendants. This case is REFERRED to the Magistrate Judge for further pretrial proceedings consistent with this Order.

Entered this 4th day of September, 1998.

JOE BILLY McDADE
United States District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 24, 2000

Before

Hon. Richard A. Posner, *Chief Judge*
Hon. Richard D. Cudahy, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*

No. 98-3567

Jess Burgess and Marilyn Thompkins,

Plaintiffs-Appellees,

v.

Louis Lowery, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 97-1244—Joe Billy McDade, *Chief Judge*.

ORDER

On February 2, 2000, defendants-appellants filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for hearing *en banc*. The petition is therefore **DENIED**.

Supreme Court, U.S.
FILED
JUN 29 2000
CLERK

(2)

No. 99-1906

IN THE

Supreme Court of the United States

LOUIS LOWERY, WILL LIVINGSTON, MICHELLE BROOKS and LATOSHA LINDSAY,

Petitioners,

v.

JESS BURGESS and MARILYN THOMPKINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Summary

Petitioners do not raise any issue meriting certiorari review in their petition to this Court. The Seventh Circuit Court of Appeals held the law was clearly established that petitioners' conduct in strip searching respondents, respectively the father and wife of Illinois prisoners, was unconstitutional absent reasonable suspicion to believe they were concealing contraband. (Pet. App. 1, 10-11) [1] This Court has provided ample guidance on the qualified immunity question, and it is for the lower courts to determine after reviewing all relevant authority whether or not the law was clearly established in order to hold a government official liable for unlawful conduct.

Any perceived conflict in principle or in analysis among the circuits as to the relevant universe of decisional law which may be considered when conducting a qualified immunity analysis does not exist subsequent to the circuits' interpretation and application of this Court's recent pronouncements in *Wilson v. Layne*, 526 U.S. 603 (1999). There is, therefore, no compelling reason to grant certiorari review of this case.

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1. The Seventh Circuit Court of Appeals opinion is reported at 201 F.3d 942 (7th Cir. 2000) and is set out at pages 1-11 of the appendix to Petitioners' Petition for Writ of Certiorari, referred to herein as Pet. App. __, including the relevant page number.

I. This Court Has Provided Sufficient Guidance Regarding the Relevant Universe of Decisional Law to Be Considered in Determining Whether or Not an Official is Entitled to Qualified Immunity.

Over the last two decades, this Court has provided significant guidance as to the meaning of "clearly established law" for qualified immunity purposes. The ultimate task of reviewing the available decisional law and determining whether or not the weight of authority clearly establishes the law providing a reasonable government official with fair notice that certain conduct is unlawful is properly left to the lower federal courts.

The defense of qualified immunity is unavailable to government officials when their conduct violates a constitutional right that was clearly established at the time the official acted. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Wilson v. Layne*, 526 U.S. 603 (1999). The doctrine of qualified immunity seeks to strike a balance between shielding officials performing discretionary functions from liability and "the public interest in deterrence of unlawful conduct and in compensation of victims." *Harlow* at 819; *see also Elder v. Holloway*, 510 U.S. 510, 515 (1994).

Although the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," it is not required that a prior case exist holding identical conduct to be unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Qualified immunity dispositions are to be "conducted in light of all relevant precedents." *Elder v. Holloway*, 510 U.S. 510 (1994). In *Elder*, this Court remanded the case for

"the Court of Appeals to consider, in light of all relevant authority" whether or not the officials were entitled to prevail on their qualified immunity defense. *Elder* at 516.

This Court recently held that the "universe of relevant interpretative decisions" is not confined to "our opinions" and pointed to other cases in which decisions of the Courts of Appeals were considered. *United States v. Lanier*, 520 U.S. 259, 269 (1997). In *Lanier* the "fair warning" requirement for violation of 18 U.S.C. § 242 was determined to be the same as the "clearly established" immunity standard for violation of 42 U.S.C. § 1983. This Court then rejected application of "a categorical rule" that excluded consideration of decisions of out-of-circuit Courts of Appeals and other courts while simultaneously recognizing that "disparate decisions in various Circuits might leave the law insufficiently certain" to clearly establish the law or provide "fair warning" to government officials. *Lanier* at 269.

Just last year this Court again reviewed the "clearly established law" standard in the qualified immunity analysis in *Wilson v. Layne*, 526 U.S. 603 (1999). The Court held that media representatives' accompanying government officials during an attempt to execute a search warrant in a home violated the Fourth Amendment, but the law was not yet clearly established in 1992 when the conduct occurred. In reaching this decision, all relevant decisional law was considered, including a published state intermediate court decision directly on point, two unpublished federal district court decisions, an out-of-circuit Court of Appeals case, as well as the written policies of the United States Marshals Service. This Court recognized that a consensus of case authority can clearly establish the law:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, *nor have they identified a consensus of cases of persuasive authority* such that a reasonable officer could not have believed that his actions were lawful.

Wilson at 617 (emphasis added).

II. The Seventh Circuit's Decision Conforms to This Court's Definition of Clearly Established Law.

The Seventh Circuit's analysis of the qualified immunity issue in this case fully comports with the holdings and principles articulated by this Court in *Harlow*, *Anderson*, *Elder*, *Lanier* and *Wilson*. The Seventh Circuit held, consistent with *Lanier*, that the absence of a decision by the Supreme Court or the Seventh Circuit Court of Appeals "cannot be conclusive on the issue of whether [or not] a right is clearly established in this circuit." (Pet. App. 4). The court further explained that a lack of Supreme Court or Seventh Circuit precedent may simply mean that the right was so clear no one thought it worthwhile to litigate the issue and to require such precedent would discourage litigants from being the first to bring a damages suit. (Pet. App. 4).

The Seventh Circuit Court of Appeals decision recognized "a long and unbroken series of decisions by our sister circuits stretching back to the early 1980's" which clearly established the law well in advance of the conduct of

petitioners. (Pet. App. 4).[2] The only aberration to this overwhelming and unbroken consensus of decisional law were two earlier Hawaii state criminal cases.[3]

The Seventh Circuit recognized that the Hawaii cases came "at the very outset of the case development, so that

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2. Not surprisingly, *all* the circuit level decisions involving prison visitor strip searches have utilized the Fourth Amendment reasonableness standard and have determined that such searches are unreasonable unless there is individualized reasonable suspicion. At the time petitioners strip searched Mr. Burgess and Ms. Thompkins, the First, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits had all separately concluded that a prison visitor may not be subjected to a strip search under the Fourth Amendment unless prison officials have reasonable suspicion to believe the visitor is concealing contraband. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 563 (1st Cir. 1985); *United States v. Johnson*, No. 93-5792, 1994 WL 260806 (4th Cir. June 15, 1994) (unpublished opinion); *Thorne v. Jones*, 765 F.2d 1270, 1276 (5th Cir. 1985); *Daugherty v. Campbell*, 935 F.2d 780, 787 (6th Cir. 1991); *Washington-Boney v. Illinois Department of Corrections*, 1992 U.S. App. LEXIS 28463 (7th Cir. 1992) (unpublished opinion); *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982); *Martinez v. County of San Diego*, No. 90-56277, 1992 WL 98452 (9th Cir. May 8, 1992) (unpublished opinion). The Second Circuit later joined in this unanimous consensus, *Varrone v. Bilotti*, 123 F.3d 75 (2d Cir. 1997), and the Tenth Circuit also recognized that reasonable suspicion is required before a prison visitor may be strip searched. *Romo v. Champion*, 46 F.3d 1013, 1020 (10th Cir. 1995); *Boren v. Deland*, 958 F.2d 987, 988 (10th Cir. 1992).

3. *See State v. Custodio*, 607 P.2d 1048 (1980) and *State v. Martinez*, 580 P.2d 1282 (1978). *But see Martinez v. County of San Diego*, 962 F.2d 14, 1992 WL 98452 (9th Cir. 1992) ("[P]rison visitors had a clearly established right to be free from strip searches not founded on reasonable suspicion that contraband might be found.").

one may doubt whether they would be followed by the Supreme Court of Hawaii today, two decades later." (Pet. App. 10-11). The Seventh Circuit reasonably and correctly concluded that two or more disparate decisions from a single court do not provide government officials with an "automatic safe harbor" if there exists overwhelming authority to the contrary. (Pet. App. 6).[4]

III. Petitioners Overemphasize the Variations Among the Circuits in Defining Clearly Established Law.

Petitioners wrongly assert that an intolerable conflict exists among the circuits with regard to the relevant universe of decisional law to be considered by Article III courts in determining whether or not the law is clearly established. All cases cited by petitioners, which they claim establish a conflict worthy of this Court's review, were decided prior to this Court's most recent qualified immunity decision in *Wilson v. Layne.*

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4. Application of an "automatic safe harbor" rule in this case would not only be contrary to Supreme Court precedent, but would belie the genuineness of Petitioner's immunity position. Indeed, Petitioner Lowery, the individual responsible for ordering the strip searches in this case, was previously sued by a prison visitor for an unlawful strip search. The Seventh Circuit held in an unpublished opinion that strip searches of prison visitors are prohibited absent reasonable suspicion. *Washington-Boney v. Illinois Dept. of Corrections*, 1992 U.S. App. LEXIS 28463 (7th Cir. 1992). Seventh Circuit Rule 53(b)(2) provides that unpublished opinions of the Seventh Circuit may be precedent to support claims of collateral estoppel. *See also Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co. v. Shore* 439 U.S. 322 (1979). Moreover, Petitioners were also aware that Illinois prison regulations specifically forbid strip searches unsupported by reasonable suspicion. 20 Ill. Adm. Code. Sec. 501.220(a)(3). (Pet. App. 1).

This Court has made clear that federal courts may consider — and indeed, may ultimately reject — out-of-circuit authority. For example, the First Circuit refused "to adopt either a hard-and-fast rule that precedent from another circuit is always determinative of whether a law is clearly established or a rule that such precedent is always irrelevant." *El Dia, Inc. v. Rossello*, 165 F.3d 106, 110 n.3 (1st Cir. 1999) (citations omitted).

Petitioners highlight the Fifth and Eleventh Circuits as jurisdictions applying a restrictive rule that allows only controlling precedents to be considered in determining whether or not the law was clearly established. The two cases cited by petitioners from the Fifth Circuit were decided prior to both *United States v. Lanier* and *Wilson v. Layne*. The single case cited from the Eleventh Circuit also was decided prior to *Wilson v. Layne*. Certiorari should not be granted because any perceived conflict in the Fifth or Eleventh Circuits will likely be resolved as these circuits' decisions reflect consideration of *Wilson v. Layne*.

Moreover, the petitioners fail to bring to this Court's attention the intramural nature of the conflict that existed within the Eleventh Circuit even prior to *Wilson v. Layne*. Ten years ago the Eleventh Circuit recognized that the holding in *Harlow* requires "we look to the law established by the Supreme Court, the courts of appeals and the district courts." *Greason v. Kemp*, 891 F.2d 829, 833 (11th Cir. 1990). Although this Court had not spoken on the specific issue of a prisoners' right to psychiatric care, the Eleventh Circuit held the law was clearly established based on the relevant decisions of other out-of-circuit courts of appeals decisions.

Moreover, a number of justices for the Eleventh Circuit Court of Appeals specifically recognized that out-of-circuit courts of appeals precedent are relevant to the qualified immunity analysis even prior to *Wilson v. Layne*. *See Jenkins v. Talladega City Board of Education*, 115 F.3d 821 (11th Cir.) (*en banc*) (Senior Circuit Judge Kravitch's dissent joined by Chief Judge Hatchett and Judge Barkett), *cert. denied*, 118 S. Ct. 412 (1997); and *Gold v. Ross*, 121 F.3d 1442 (11th Cir. 1998) (Judge Barkett's dissent to rehearing *en banc*). Thus, the Eleventh Circuit was already moving toward conformity with this Court's later pronouncements in *Wilson* and *Lanier*.

The Fifth Circuit never squarely addressed the quantum of out-of-circuit precedent that may be sufficient to clearly establish the law in the absence of Supreme Court or Fifth Circuit authority.[5] However, recent language emanating from members of the Fifth Circuit Court of Appeals suggests that the Fifth Circuit, too, stands poised to reject a more restrictive definition of clearly established law and follow this Court's guidance. In a recent case decided after *Lanier*, the "fair warning" issue was not squarely presented or discussed in the majority opinion. Notwithstanding, a concurring justice addressed the issue, *sua sponte*, and specifically sanctioned consideration of out-of-circuit decisions. *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) (Judge Dennis' concurring opinion).

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5. Petitioners cite two cases in support of their position, however, *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995) merely held that "[o]ur inquiry [into what was clearly established law] ends, if we find from examining the decisions of the Supreme Court and our own decisions that the law was clearly established in this circuit," and *Guanaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995) held the law was not clearly established but does not mention if any out-of-circuit authority to the contrary even existed.

This Court has correctly refused to set forth a categorical rule to determine the precise parameters of the decisional law which may be considered by Courts of Appeal in determining "fair notice" or "clearly established law." Rather, this Court has implicity recognized the competence and providence of the lower courts to review the universe of decisional law and determine whether or not the weight of authority exists to clearly establish the law.

The Courts of Appeal in the Fifth and Eleventh Circuits will continue to hone their definition of clearly established law as the issue is presented and with the recent guidance of this Court. Certiorari should be denied due to the likelihood that these issues will be resolved as tribunals are allowed "to serve as laboratories" providing further study prior to determination by this Court. *McCray v. New York*, 461 U.S. 961 (1983) (cert. denied).

The Seventh Circuit's conclusion that a unanimous consensus of all circuit level decisions to decide an issue over the course of two decades may clearly establish the law for qualified immunity purposes is consistent with this Court's pronouncements. Petitioners here can point to no conflicting authority in any circuit after *Wilson v. Layne.*

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

LOUIS LOWERY, WILL LIVINGSTON, MICHELLE BROOKS, and LATOSHA LINDSAY,

Petitioners,

v.

JESS BURGESS and MARILYN THOMPKINS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. *Wilson v. Layne* Did Not Resolve The Conflict Among The Circuits On The Question Whether Out-Of-Circuit Decisions May Be Considered In The "Clearly Established Law" Analysis.

The respondents' main argument against granting *certiorari* is that *Wilson v. Layne*, 526 U.S. 603 (1999), already informs lower courts that they may consider decisions from non-controlling jurisdictions in determining whether the law is clearly established for qualified immunity purposes. *Wilson*, however, does not stand for that proposition. Simply put, the *Wilson* Court did not have occasion to decide, and did not decide, the question raised in this case. As a result, the lower federal courts have no more guidance on the question now than they had before *Wilson*.

In *Wilson*, the Court considered whether police officers were entitled to qualified immunity when they invited members of the media to witness the execution of an arrest warrant in a private home. After determining that this practice violated the Fourth Amendment rights of the persons being arrested, the Court surveyed the decisional law on the legality of "media ride-alongs" and concluded that the law governing the defendants' conduct had not been clearly established as of the time they acted. *Wilson*, 526 U.S. at 615-18. In so ruling, the Court stated:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable of-

> ficer could not have believed that his actions were lawful.

Wilson, 526 U.S. at 617.

Based entirely on the second clause of this sentence, the respondents contend that the Court has effectively resolved the split in authority the petitioners identified in their petition for writ of *certiorari*. (Br. in Opp. at 3-4). They are wrong. The Court did not have to decide in *Wilson* whether the relevant universe of decisional law for qualified immunity purposes should include cases from non-controlling jurisdictions. This is because the defendants in *Wilson* were entitled to qualified immunity based upon the paucity of caselaw from *any* jurisdiction on the subject of media ride-alongs. Therefore, the sentence quoted above does not constitute a holding that lower federal courts may look to non-controlling jurisdictions in determining whether the law is clearly established. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion *necessary to that result* by which we are bound") (emphasis added).

Wilson, then, did not squarely decide whether courts may rely on out-of-circuit decisions to deny public officials the benefit of qualified immunity. The Court, moreover, cannot have meant for the above-quoted sentence—which constitutes only *dicta*—to resolve a split in authority on a question that has proved so vexing to the courts of appeals. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of this Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

Therefore, there is little chance that the lower courts will read *Wilson* as providing any basis for rethinking their approaches to the qualified immunity question. *Cf. Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (*en banc*) (Eleventh Circuit reaffirms its decision to consider only controlling precedents in "clearly established law" analysis after *United States v. Lanier*, 520 U.S. 259 (1997), where *Lanier* did not "identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place").

Indeed, early indications suggest that *Wilson* will not have the impact the respondents predict. Since *Wilson*, several lower courts have stated or implied that non-controlling cases need not be considered in the "clearly established law" analysis. *See, e.g., Sound Aircraft Serv., Inc. v. Town of E. Hampton*, 192 F.3d 329, 337 (2d Cir. 1999) ("To determine whether a particular right was clearly established at the time the defendants acted, the district court should consider . . . whether the decisional law of the Supreme Court and the [Second Circuit] support the existence of the right in question") (brackets in original) (internal quotations and citation omitted); *Hall v. Thomas*, 190 F.3d 693, 696-97 (5th Cir. 1999) (*per curiam*) (finding lack of clearly established law where "neither the Fifth Circuit nor the Supreme Court had spoken on the issue"); *Amaechi v. West*, 87 F. Supp. 2d 556, 562 (E.D. Va. 2000); *Thomas v. Clayton County Bd. of Educ.*, 94 F. Supp. 2d 1290, 1309 (N.D. Ga. 1999); *Truelove v. Hunt*, 67 F. Supp. 2d 569, 578 (D.S.C. 1999). None of these courts cited *Wilson* for the proposition that the relevant universe of decisional law should or even could

include cases from outside the controlling jurisdictions. These decisions belie the respondents' claim that the lower courts will refine their approaches to the "clearly established law" question in light of *Wilson*.

In sum, *Wilson* did not, and was not intended to, resolve the conflict among the courts of appeals on the question whether non-binding caselaw should be considered in determining whether the law is clearly established. Because of the acknowledged difficulty this question poses, *see, e.g., Johnson v. Horn*, 150 F.3d 276, 286 (3d Cir. 1998); *Zweibon v. Mitchell*, 720 F.2d 162, 168-69 (D.C. Cir. 1983), the lower courts should not have to glean the correct answer from *dicta*, but rather should have the benefit of this Court's considered judgment on the question. This Court should grant *certiorari* to provide guidance on this important issue.

II. The Petitioners Have Not Overemphasized The Conflict Among The Circuits On The Question Whether Out-Of-Circuit Decisions May Be Considered In The "Clearly Established Law" Analysis.

The respondents next claim that the split in authority identified at pages 8-9 of the petition for writ of *certiorari* is not as pronounced as the petitioners assert. (Br. in Opp. at 7-8). The respondents are wrong. There is a direct conflict among the circuits on the scope of relevant caselaw to be considered in the "clearly established law" analysis.

First, the respondents dispute the petitioners' contention that the Fifth Circuit will only consider its own precedents in determining whether the law is clearly established. (Br. in Opp. at 8 & n.5). If the petitioners

have misstated the Fifth Circuit's approach, then the Fifth Circuit has confused not only the petitioners, but also a distinguished judge in a sister circuit, *see Johnson*, 150 F.3d at 286 n.6 (Aldisert, J.) (Fifth Circuit will consider only controlling caselaw in qualified immunity analysis), as well as several district courts within its jurisdiction, *see Alton v. Hopgood*, 994 F. Supp. 827, 835 n.5 (S.D. Tex. 1998) ("The Fifth Circuit has directed courts to examine only Supreme Court and Fifth Circuit precedent in the course of determining whether a legal principle is 'clearly established' "), *aff'd sub nom. Alton v. Texas A & M Univ.*, 168 F.3d 196 (5th Cir. 1999); *Brinson v. McKeeman*, 992 F. Supp. 897, 907-08 (W.D. Tex. 1997) (same). In addition, the Fifth Circuit recently sustained a qualified immunity defense precisely because no controlling authority had held the conduct in question to be unlawful. *See Hall*, 190 F.3d at 696-97.

The respondents' contention that the Fifth Circuit might consider non-controlling cases in the "clearly established law" analysis is based upon one circuit judge's concurring opinion in a criminal case in which the qualified immunity defense was not even at issue. (Br. in Opp. at 8). Concurring opinions, however, are not precedential and do not signal a shift in a circuit's law. Therefore, the respondents have failed to undermine the petitioners' assertion that the Fifth Circuit will only consider controlling precedents when resolving qualified immunity questions.

As for the Eleventh Circuit, the respondents allege that the petitioners "fail to bring to this Court's attention the intramural nature of the conflict that existed within the Eleventh Circuit even prior to *Wilson v.*

Layne." (Br. in Opp. at 7). No such conflict existed before *Wilson* and none exists now.

In *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (*en banc*), the Eleventh Circuit reaffirmed its longstanding position that "clearly established law" can only be determined by reference to "decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." Under its "prior precedent" rule, the Eleventh Circuit will follow this *en banc* ruling until it is overruled by this Court or by the Eleventh Circuit sitting *en banc*. *See Murphy v. FDIC*, 208 F.3d 959, 969 (11th Cir. 2000); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998). For the reasons explained above, *Wilson* has not overruled *Jenkins*. The Eleventh Circuit will thus continue to follow *Jenkins* until this Court or the Eleventh Circuit sitting *en banc* overrules it. There is no "intramural conflict" within the Eleventh Circuit.

Contrary to the respondents' argument, there is a direct conflict among the courts of appeals on whether non-controlling caselaw is relevant to the "clearly established law" analysis. (*See* Pet. for Writ of Cert. at 8-9). The answer to this question, moreover, affects local, state, and federal officials throughout the country. Because of the circuits' inability to reach a consensus on this important question, this Court should grant *certiorari* to provide a definitive answer.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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